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# Negotiating Navy construction contracts.

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# NEGOTIATING NAVY CONSTRUCTION CONTRACTS

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This report is dedicated to my wife for her support and patience, and to the memory of Ken Madden and our 23 years as best friends.

# INTRODUCTION

The purpose of this report is to examine construction contract negotiation as it applies to the Navy Civil Engineer Corps (CEC) officer. The CEC is responsible for $2-3 billion each year in military construction performed by civilian contractors under Navy contracts (NAVFACENGCOM, 1986). Currently, 35% of the CEC officers are in billets which require negotiating with civilian construction contractors (Chief of Civil Engineers, 1986). The number of construction contracts performed by civilian contractors is growing, as is the Navy's need for negotiation expertise in the construction area.

The emphasis of this paper is on the methods and procedures of construction contract negotiations as they apply to the CEC officer. Topics examined include the circumstances which allow procurement through negotiation vice formal advertising, the phases of negotiation, and recommended approaches to these phases.

The three phases of the negotiation process are preparation, performance, and documentation. Preparation is the most important phase of negotiating because of its vast impact on all actions which follow. Planning strategy and forming a negotiation team are primary

functions of preparation. Performance of the negotiation can also be viewed in phases. Opening the meeting, the gathering of further information during the meeting to confirm assumptions, issues, and objectives, and the actual negotiation towards agreement are all stages of negotiation performance. Documentation justifies that the negotiation results are fair and reasonable and serves as a historical record.

There are many ways to approach the three phases of negotiation. Methods of approach which promote win-win negotiating are recommended. This involves finding a solution that provides mutual satisfaction to all parties while maintaining the highest standards of conduct. Tactics are an inherent part of all negotiations, including win-win negotiations. Even if one does not use tactics, it is necessary to understand the dynamics and reasoning behind them for protection. Because, whether the reader uses tactics or not, the contractor will be using them to gain maximum advantage.

For the CEC officer to be an effective negotiator, he must thoroughly understand the methods and procedures of negotiation. He must have knowledge of the government regulations which apply, and

an understanding of the negotiation environment. Proficiency in communication, both verbal and non-verbal, as well as in strategy and tactics is also needed to successfully negotiate with the professional contractor.

This paper does not establish negotiating policy for the Navy or any portion of the government. Furthermore, it does not necessarily reflect the views of the United States Government or the Navy. If there is any conflict between this paper and official publications, the official publications are to be followed.

# CHAPTER ONE
# GOVERNMENT CONTRACT NEGOTIATIONS

## Formal Advertising

Title 10 of the United States Code, sections 2301-2314 (1986), known as The Armed Services Procurement Act (ASPA) requires the use of *formal advertising* in all cases in which the use of such a method is feasible and practical. The steps of formal advertising are described in the Code of Federal Acquisition Regulations (Code of Federal Acquisition Regulations [FAR], 1986) as the preparation of an *Invitation for Bids* (IFB), its publication and distribution, and the public opening, recording, and tabulating of bids received. This is done at a preestablished time stated in the Invitation For Bids. Award of contract is made to the lowest responsive and responsible bidder (FAR, 1986; U. S. Naval School, 1986). This is also referred to as the use of full and open competition, or "the process by which all responsible offerors are allowed to compete" (FAR, 1986, p. 53).

The advantages to formal advertising are many. First, procurement through formal advertising, under normal circumstances, assures the government the lowest possible price consistent with the procurement of satisfactory work. Second, by bringing all aspects

of the selection process into the open and by relying on a single criterion for award - the lowest responsive and responsible bid - suspicion of favoritism is diminished and public confidence in the government procurement policies is bolstered. Finally, formal advertising gives all interested persons an equal opportunity to compete for and obtain government contracts backed by public funds (Jayson & Edwards, 1986; U. S. Naval School, 1986).

Formal advertised bidding is not always feasible. Without the following prerequisites, the advantages of formal advertising may not be obtained: (a) Detailed plans and specifications which can be bid upon competitively are necessary to ensure the prospective contractor is provided optimal opportunity to prepare a proposal based on the best information available; (b) non-classified plans and specifications; (c) a sufficient number of bidders, at least three are required, who are able and willing to compete for the business; and (d) sufficient time. The amount of time required to prepare plans and specifications and to evaluate bids should not be underestimated (U.S. Naval School, 1986).

The failure to meet each of these conditions satisfactorily may make awarding a contract on the basis of low bid not only undesirable but impossible. For example, if it were impossible to distribute detailed plans and specifications for a given job, prospective bidders would have insufficient basis for preparing their bids. Potential contractors could refuse to submit any bid. The bidders could also include substantial contingency allowances in the estimate to protect themselves against the high margin of error imposed by lack of adequate information. The potential expense to the government in this case is considerable (U. S. Naval School, 1986).

## Negotiation

Negotiation is an alternative to formal advertised bidding. Inability to satisfy one or more of the four prerequisites listed above may indicate that procurement through *negotiation* is in order. The definition of negotiation and the specific conditions under which contracts may be negotiated must first be examined closely.

The FAR (1986) defines negotiation as "contracting through the use of either competitive or other-than-competitive proposals and discussions. Any contract awarded without using sealed bidding

procedures is a negotiated contract" (FAR, 1986, p. 181). The Naval Facilities Engineering Command (NAVFACENGCOM) Contracting Manual P-68 (1985) defines a negotiated contract as one "without public advertising and open competitive bidding" (p. 5.1). The Civil Engineer Corps Officers School (CECOS) manual An Introduction To NAVFAC Contracting (1974) defines a negotiated contract as one "where formal advertising is not feasible or practical, and a contract is awarded without public advertising *and* competitive bidding" (p. 21). Public advertising is often used to increase qualified sources for negotiated contracts, particularly in the case of highly technical contracts.

## Authority to Negotiate

The ASPA (1986) and the policies of FAR (1986) require formal advertising. Only when formal advertising is not feasible or practical *and* one of the statutory exceptions is met, is there valid reason not to use formal advertising. Every negotiated procurement must be justified under one of the exceptions. The circumstances permitting other than full and open competition that have general application to NAVFACENGCOM are as follows: (a) only one responsible source is

available; (b) national emergency; (c) public exigency, as determined by NAVFACENGCOM, will not allow the delay incident to formal advertising; (d) the contract amount is less than $2,500; (e) the contract is for personal or professional services; (f) contract is for any service by a university, college, or other educational institution; (g) contract is for services of property to be procured and used outside the United States and its possessions; (h) impractical to obtain competition (often cited for utilities, highly specialized equipment, and construction contract modifications); or (i) otherwise authorized by law. Chapter 1, subpart 6.302 of the FAR (1986) allows procurement by negotiation under any of the above exceptions. Reference to the specific authority under which it was negotiated must be contained in each contract (FAR, 1986).

Another situation which may require contract negotiation is the cancellation of bids after opening but prior to contract award. Bids may be cancelled for many reasons, but only two reasons qualify for completion of the contract through negotiation. The first reason is based on bid reasonableness. That is, all bids received are at unreasonable prices, or only one bid is received and the contracting

officer has no way to determine if the bid is reasonable. Also, if the bids were not developed independently, or they were submitted in bad faith, the contract may be completed through negotiation. Permission to reject all bids and negotiate must be received from NAVFACENGCOM. If permission is not granted, the contracting officer must proceed with a new acquisition. In order to preserve the integrity of the bid system, there must be a compelling reason to reject all bids (FAR, 1986).

In practice, permission to negotiate is difficult to obtain from NAVFACENGCOM if there is any possibility that the procurement can be handled through formal advertising. Nonetheless, there are many opportunities for CEC officers to be directly involved in the negotiation process. The prudent officer will wisely familiarize himself with the regulations, procedures, and strategies, and tactics for this method of awarding and modifying contracts without using sealed bid procedures.

## Competition in Negotiated Contracts

The absence of open competitive bidding and sealed bids does not mean that competition is absent. Negotiated contracts most often

involve competition, with the rare exceptions of *sole source* negotiations and contracts for amounts less than $2,500. For all negotiated procurements exceeding $2,500, 10 USC 2304 (1986) requires that proposals must be solicited from the maximum number of qualified sources (U. S. Naval School, 1986). The result is termed *competitive negotiation* . Procedures for obtaining the maximum number of sources can be found in U. S. Naval School, 1986, p. 3-2,4 and NAVFACENGCOM, 1985, p. 5.2.1,3.

The procedure for awarding competitively negotiated contracts is a function of the type of contract. The type of contract is determined by the authority the contract is negotiated under. The FAR (1986) provides the authority to negotiate based on the exception cited. Competitive negotiation usually begins with the submittal of a formal proposal in response to a government *Request For Proposal* (RFP). Each proposal is evaluated from both a quality and cost standpoint. Those proposals within a competitive range are negotiated. Award is based on the most favorable negotiation results. Negotiations may be conducted with any number of contractors, which introduces an element of competition into the negotiations.

Also in contrast to formal advertising, proposals are never opened publicly, and the identity of unsuccessful proposers or the contents of their proposals are not revealed. As is true with all types of negotiated procurements, approval for competitive negotiation is not normally granted if there is reason to believe that usual procedures, formal advertising, would produce timely results (FAR, 1986; NAVFACENGCOM, 1985; Naval School of CEC Officers, 1974; U. S. Naval School, 1986).

Competitive negotiation is advantageous when: (a) Highly specialized skill or experience is required; (b) it is essential that the work start as soon as possible, and it must be in strict compliance with the plans and specifications; (c) the work will be overseas; or (d) the project will be *turnkey* (U. S. Naval School, 1986).

According to Naval School of CEC Officers, 1974, the most common uses of competitive negotiation by NAVFACENGCOM include:

> (1) construction, maintenance, repairs, alterations, and inspectio when the exact amount of work to be done is unknown; (2) th purchase of highly specialized equipment; and (3) the securing planning, preparation of the design and specifications, an construction of the facility by a single party, bound by one contrac The latter is known as a "turnkey" procurement which is used b NAVFACENGCOM for housing projects". (p. 26)

Competitive negotiation is not applicable for procurements with one or more of the following characteristics; (a) the amount is expected to be less than $2,500, (b) there is not adequate time to permit the written or oral discussions required for negotiations, (c) prices are fixed by law or regulation, or (d) the RFP allows award without discussion of the proposals and adequate competition or cost experience exists. Negotiation procedures would be utilized, but without competition.

Even when competitive negotiation procedures are used, it is the policy of NAVFACENGCOM to make an award to the low conforming bidder when feasible. Feasibility is determined by contractor conformance to contract specifications, and the lowest initial proposal. Negotiation may be warranted when all prices are unreasonably high or when all proposals do not conform to the terms of the RFP (FAR, 1986; NAVFACENGCOM, 1985; Naval School of CEC Officers, 1974; U. S. Naval School, 1986).

When competitive negotiation procedures are used, strict care must be exercised to ensure no proposer is aware of prices submitted by others, and that no proposer is advised of the government's price

that must be met for award. If this information is not protected, an auction situation exists. Procurement for the government may be obtained through formal advertising or negotiation, but never by auction (NAVFACENGCOM, 1985; U. S. Naval School, 1986).

## Types of Contract Negotiations

The decision for award of government contracts is essentially based on two criteria: ability to perform, and price. The nature of supplies or services to be procured and the procurement method used determines the degree of emphasis placed on performance or price for contract award. For example, the award of highly technical contracts is based primarily on the contractors ability to perform the work. In contrast, overseas contracts, which involve closed competition bidding, are awarded primarily on the basis of lowest bid, with performance a lesser consideration. Many negotiated procurements can be classified as *price competitive* or *non-price-competitive* . Contract negotiations also occur after contract award. These negotiations modify the existing contract. *Bilateral change orders* and *termination settlements* make up the majority of post-award negotiations (26; 29).

## Price Competitive Negotiation

The procedures for price competitive negotiations are very similar to those of formal advertising. The major difference is that proposals are solicited only from selected firms. The exception to this would be a firm who requested to be included although not selected for inclusion. Firms are selected who, in the Contracting Officer's opinion, have the resources and capability to perform the work. Most negotiated procurements require only those resources and skills which are common to the average contractor.
Price-competitive contracts are awarded primarily on the basis of lowest bid, with performance a lesser consideration (26; 29).

A contract negotiated due to unusual and compelling urgency is an example of a price competitive negotiated contract. An example would be construction needed after a hurricane, flood, explosion, or other disaster. Competition would consist of getting three or more firms to look at the work and submit prices, with award being made on the basis of the lowest offer. Another example is a major construction contract negotiated solely because the work is to be

done in a foreign country. In this case the award procedures may be almost identical to those used in formal advertising (33; 29).

Non-Price-Competitive Negotiation

When it is necessary to consider factors other than price in making award, it is called non-price-competitive negotiation. In contrast to price competitive negotiations, non-price-competitive negotiations include contractor interviews as part of the award procedure. These interviews are used to supplement the contractor's proposal in the selection of the most qualified contractor. The personal interview gives the Contract Award and Review Board the opportunity to more fully understand the contractor's proposal by discussing in detail the job requirements and conditions, and his assumptions. In addition, it gives the board the opportunity to evaluate the general technical and managerial abilities of key contractor personnel as well as their understanding of the contract work. *Technical competition* and *cost-reimbursement* negotiations are the most common types of non-price-competitive negotiation in Navy construction (U. S. Naval School, 1986).

Technical Competition

Technical competition is used when professional competency is of greater importance than contract price. Examples of this type of negotiated contract are engineering services (E/S) and architectural services such as those for testing, specialized engineering studies, surveys, technical investigations, and design. RFPs are issued to contractors selected by the Contracting Officer for their ability to perform the work as well as to those contractors who may request a proposal. After receipt of proposals, contractors are selected by a Contract Award and Review Board for negotiation based upon technical qualifications, experience, organization, key personnel, workload, support facilities, and other relevant factors. The Board selects a first and second alternative in case it proves impossible to reach satisfactory price agreement with the first. If the Contracting Officer and the selected contractor cannot negotiate a fair and reasonable price, the first alternate will be contacted and negotiations will be attempted. Negotiations are normally accomplished with the original firm selected (NAVFACENGCOM, 1985; U. S. Naval School, 1986).

Cost-Reimbursement

Cost-reimbursement contracts, or cost contracts, are negotiated and awarded when the nature of the work or other circumstances make a firm price arrangement impractical. Cost contracts are used for major rehabilitation of inactivated bases, for work of an exploratory or experimental nature, for work to be performed in a war zone, or for other situations where the contractor cannot reasonably control or predict conditions having a major and direct effect on the performance of the work (NAVFACENGCOM, 1985).

As with technical competition, RFPs are issued to contractors selected by the Contracting Officer for their ability to perform the work as well as to those contractors who may request a proposal. "The proposals are normally analyzed and evaluated (by the Contractor Award and Review Board) using the following factors weighted as shown; (1) contractor's qualifications (50%), (2) job analysis and plan of operation (20%), (3) estimate of costs (20%), (4) reimbursement fee (10%)" (Naval School of CEC Officers, 1974, p. 27).

## Other Types of Contract Negotiation

The following contract types can not be categorized as price or non-price-competitive contracts. Contractor selection and contract award procedures of the following negotiated contracts differ from those of these two competitive negotiation categories.

### Single Source

Single source, also known as one source or sole source negotiations, are negotiations conducted with only one firm. Negotiations are justified if there is only one source which can provide the required supplies or services or where urgency precludes the consideration of other sources. After technical competition has been used to arrive at a single firm, such as an architectural firm, the price negotiations are called single source. However, in this instance the negotiations are not single source per se because the Contracting Officer has the option to negotiate with alternative firms if a fair and reasonable price cannot be agreed upon. True single source procurements prevent competition of any type and are therefore avoided whenever possible (FAR, 1986; NAVFACENGCOM, 1985; 29).

Turnkey

Turnkey negotiation combines both technical and price considerations. Turnkey contracting is a form of contracting where the contractor is responsible to not only construct the facility but also to design and prepare plans and specifications for the project. The navy only uses this method of procurement for military housing as a result of restrictions by Congress (U. S. Naval School, 1986). The basis for award makes competitive bidding without negotiation impractical. Award is based on comparison of several different models, site plans, and many kinds of materials and equipment. Sole reliance on price would result in the purchase of the cheapest package, no matter how unsatisfactory or costly in the long run. Award is made to the firm submitting the best proposal in terms of quality and cost and not necessarily to the firm submitting the lowest cost proposal. As in all competitive negotiations, there is no public proposal opening and identities of offerors are not revealed (NAVFACENGCOM, 1985; U. S. Naval School, 1986).

Small Business (8(a))

Contracts through the Small Business Administration (SBA) are termed *8(a) contracts* (FAR, 1986). Small business legislation permits the SBA to select disadvantaged contractors for government work (FAR, 1986). The SBA seeks out government agencies who contract, and tries to match the disadvantaged contractors to the requirements of the agency. The government agency then negotiates the contract with the SBA. When mutually agreeable, and as is common practice, the SBA may authorize the government to negotiate directly with the contractor (FAR, 1986; NAVFACENGCOM, 1985).

Small Purchase

*Small Purchase* contracts are a simplified method of contracting that may be used when certain conditions are met. They are contracts for supplies, services, and construction for $25,000 or less. Contracts for supplies, services, and maintenance for amounts less than $2,500 may be negotiated (NAVFACENGCOM, 1985). For construction, alteration, or repair, the contract amount must be less than $2,000 (NAVFACENGCOM, 1985). Negotiation competition is required if contract amounts are greater than $1,000 (NAVFACENGCOM, 1985).

## Negotiations After Contract Award

Contract negotiations are not confined to the negotiation of the original contract. Contract modifications are required during the course of a contract for many reasons, particularly on major projects. Examples of often needed changes are those in technical characteristics, performance characteristics, and delivery requirements. Much less common are modifications resulting in contract termination. The terms and conditions of the contract and government regulations govern most of the circumstances of these types of negotiation (NFCTC, 1986; Western Division NAVFACENGCOM, 1983).

### Bilateral Change Order

If after a contract is awarded any change is required to the contract, it will be accomplished by a contract modification. In-scope bilateral modifications are often termed change orders. Change orders are usually single source negotiations with the incumbent contractor acting as the sole source. However, other sources may exist and performance of the work by these sources may be feasible. The possibility of using "in house" forces or

competitively bidding the work should be kept in mind whenever negotiating changes to existing contracts (NFCTC, 1986; Western Division NAVFACENGCOM, 1983)

Change orders are very common in construction contracts. Site conditions different from those on the plans, work delays, ambiguities in the plans and specifications, and additional work within the contract scope are common reasons for change order negotiations. The bilateral change order is the most common type of negotiation performed by the CEC officer. There is a variety of reasons and situations which necessitate changes to the original contract. The sources for the initiation of these modifications are of three types; user, Engineering Field Division (EFD)/Officer in Charge of Construction (OICC), and field (NFCTC, 1986; Western Division NAVFACENGCOM, 1983).

After the design is completed and the contract is awarded, the user of the facility may decide it needs or wants something different than that specified in the contract. This occurs even though the user approves final design before award. The user's mission may have changed, or the requirement for minor modifications may be

discovered after contract award. Delivery may be needed sooner than the date specified in the contract, or suspension of work may be necessary. Changes to the physical characteristics and technological capabilities of the facility are the most common types of user requested changes (NFCTC, 1986; U. S. Naval School, 1986; Western Division NAVFACENGCOM, 1983).

The EFD or OICC normally initiates modifications as a result of changes in design criteria or the discovery of design errors during review of the shop drawings or field inspections. Difficulties encountered at the field level by the Resident Officer in Charge of Construction (ROICC) or contractor personnel may also be resolved by the EFD or OICC (NFCTC, 1986; U. S. Naval School, 1986; Western Division NAVFACENGCOM, 1983).

Most field initiated changes result from the following situations; (a) site conditions differ from those shown on the plans, (b) design errors or deficiencies, (c) the need for coordination of the contractor's work with other contractors or with the government, (d) ambiguities in the plans or specifications, or (e) government caused delay. Field initiated changes are the most common and are often

numerous in construction contracts (NFCTC, 1986; U. S. Naval School, 1986; Western Division NAVFACENGCOM, 1983).

Termination settlement

Termination settlements are another form of contract modification. Contracts are terminated only when there are no other alternatives. Total or partial contract terminations are enacted either for the convenience of the government or as a result of contractor default. The reasons for termination for the convenience of the government are limited only by the government's needs. Default terminations are the result of the contractor refusing or failing to complete the work within the time specified in the contract. In both cases a deductive change for work not completed must be negotiated as well as possible damages to the contractor or the government. The atmosphere of the negotiations is similar to that of sole source negotiations. No price competition is involved. The contractor has no alternative but to terminate. And the government has no alternative but to negotiate, unless it decides a unilateral settlement is required. Termination settlements are involved, complicated, and difficult. There are few winners and many casualties in contract terminations (NFCTC, 1985; NFCTC, 1986).

# CHAPTER TWO
# PREPARATION AND STRATEGY

## Importance of Preparation

Preparation is the most important phase of negotiating (NFCTC, 1985). Negotiation without preparation invites failure. No amount of experience or skill on the part of the negotiator can compensate for its absence (Sullivan, 1984). At least as much time should be spent preparing as negotiating.

The contractor inherently knows more about his proposal than the government negotiators, giving him a distinct initial advantage. The contractor knows the assumptions underlying cost estimates, the areas where contingencies have been added, limits and deadlines, and most important, the actual amount he is willing to settle for. The government negotiators must gather as much information as possible in order to minimize the contractor's advantage. A cardinal rule of negotiation is to be prepared. The more information the government negotiators have about the contractor's priorities, financial situation, deadlines, costs, real needs, and organizational pressures, the better position they are in to negotiate (NFCTC, 1985; Dawson, 1985; Shea, 1983).

To be an effective negotiator requires knowledge and proficiency. Thorough preparation is the key to acquiring these assets.

An effective negotiator must have a broad knowledge base. He must be thoroughly familiar with regulations that apply to contract negotiations; he must understand the negotiation environment, eg. construction; and he must be knowledgeable in business, accounting, and pricing (NFCTC, 1985).

Proficiency in many areas must be obtained in order to be an effective negotiator. He must be skillful in planning strategy and tactics. Proficiency in the art of communication, argument and persuasion are also required. He must have the ability to identify the issues involved, develop price positions, and determine his options. Thorough preparation and tenacity will reward the negotiator many times in increased knowledge and proficiency (Brooks & Odiorne, 1984; Harris, 1983; Johnston, 1985; NFCTC, 1985).

## Negotiation Strategy

Planning strategy is a large part of preparation for negotiation. Webster's New World Dictionary (1976) defines strategy as "the science of planning and directing" negotiations, "specifically ,as

distinguished from tactics, the maneuvering of forces into the most advantageous position prior to actual engagement" with your opponent (p. 1407). In other words, strategy is long-range planning concerned with obtaining long-range goals. Tactical planning is concerned with reaching short-range goals. Tactical maneuvers and techniques are the methods and procedures of accomplishing these short-range goals. Strategy puts one into the position to use tactics, in order to reach long range goals (Karrass, 1970).

Before entering into formal negotiations with the contractor, negotiation strategy must be well planned. The acquisition requirements must be thoroughly understood as well as the contractor's proposal. Objectives and how they are to be obtained must be determined. Identification of negotiation issues is also imperative. Planning for the possibility of not reaching agreement and investigating alternatives to agreement are also important elements of strategy (Dawson, 1985; NFCTC, 1985).

### Understanding the Acquisition Requirement

Without a clear understanding of what is being purchased, one cannot dispute what the contractor considers a fair and reasonable

price. The government estimate provides a basis for negotiations, but a comprehensive understanding is required to evaluate the contractor's position. For example, a contractor's price proposal may contain a price for engineering and fabricating an item that is not commercially made, but he "must" have it to perform the work. The government negotiating team must understand the work process to evaluate the need for the item and alternative methods. Whether the item or a similar item has been previously fabricated and whether it is available commercially must also be considered. A simpler, less costly solution may be found, providing economic benefits to the government and the contractor. The better the negotiating team understands the supplies or services it must purchase, the better job they can do throughout the contracting process. This is especially true at the negotiating table (NFCTC, 1985).

Other considerations for a better understanding of the acquisition include critical problem areas and the probable levels of engineering effort to overcome such problems, what government furnished property may be provided, and whether the acquisition falls under the Truth-in-Negotiations Act. Once the team is thoroughly

familiar with this background information, it is ready to analyze the contractor's proposal (NFCTC, 1985).

Contractor's Proposal

Price negotiations are meaningless unless both sides have the same understanding of the acquisition. The government can not assume that the contractor interprets the terms and conditions of the contract or modification in the same manner as they do. A common understanding can be established prior to negotiations. This can be done through informal meetings or whatever way is most practical. If a common understanding is not established before negotiations, the areas of disagreement will become negotiation issues. The negotiations will then revolve around issues that would have been simple clarifications if handled earlier. The contractor's proposal can be analyzed once it is determined that there is commonality of understanding between the government and the contractor (NFCTC, 1985).

Analysis of the contractor's proposal provides the government with the information it needs to establish negotiation positions. The data and information in the proposal give the negotiator a basis to

defend or promote positions. Analyzing the contractor's method of price breakdown must be studied as well as the prices. The proposal provides clues to the contractor's reasoning process when establishing prices. Combined with other information and data, including the government estimate, analyzing the contractor's proposal gives the government the necessary foundation for establishing price objectives (NFCTC, 1985; Naval School of CEC Officers, 1974).

## Objectives

The price objective is the negotiation position that is considered a fair and reasonable target for the acquisition. Definite price objectives enable a fair settlement, the reasons for which can be well justified and documented. Objectives such as "a price fifteen percent below the proposal" are too vague. If the team is considering alternative packages, definite objectives must be established for each possible alternative. If there are objectives other than price, these should be clearly established as well (NFCTC, 1985). Decisions must also be made "as to which objectives cannot be compromised under any circumstances, and which objectives can be compromised,

to what extent, and in exchange for what" (Naval School of CEC Officers, 1974, p. 25).

The negotiation team should attempt to anticipate the position that the contractor is likely to take as well as define its own objectives. Anticipating the contractor is difficult, but evaluating his bargaining position is helpful. There are many important factors to be considered. Some of these factors are:

(a) The degree of competition present.
(b) the contractor's need or desire for work.
(c) the time pressures on the government and the contractor to obtain agreement.
(d) regulatory pressures in the form of the (FAR)and other procurement regulations, and administrative processes.
(e) legal pressures.
(f) political pressures.
(g) public opinion as it affects the reputation of the parties concerned. (U. S. Naval School, 1986, p. 5-20)

Evaluating the contractor's bargaining position aids the team in organizing a strategy. Appropriate responses with backup documentation can be prepared as well as other maneuvers and techniques.

## Issues

"An issue is a statement or an assertion about which people differ and concerning which they take opposing sides" (NFCTC, 1985, p. 2-11). Issues are the heart of negotiations. All information available should be utilized to determine possible issues. The question "where are the areas of disagreement?" Should be asked in order to identify issues. The contractor's probable position on each issue can then be recognized and analyzed. The Government's position must also be established for each probable issue. An outline of the major points of difference between the government and the contractor, including evidence supporting the issues, can be extremely helpful. Analyzing and organizing the cost and profit elements will provide the negotiating team with valuable supporting information at a glance (NFCTC, 1985).

## Developing Alternatives

Reaching an agreement in negotiations is not an end in itself. People negotiate in order to improve their present situation. Leaving a negotiation with less than one entered is not uncommon. People are often more dedicated to reaching an agreement than to minimizing

their losses. If an alternative to a negotiated solution is not developed, pessimism about what might happen if negotiations came to a halt is high. The tendency is to finish the negotiation no matter what the cost. Developing alternatives to a negotiated agreement gives a standard by which to measure any proposed agreement. By using a standard, one can guard against rejecting an agreement which would be in one's best interest as well as guard against a poor agreement (Fisher & Ury, 1981; Shea, 1983). Fisher and Ury (1981) call this standard "one's *Best Alternative to a Negotiated Agreement (BATNA)* ."

The relative power of opposing negotiators is determined by the attractiveness of each person's option of not reaching agreement. Developing possible BATNAs involves creating a list of actions through brainstorming or other techniques, developing the more promising ideas into practical options, and, selecting and testing the best option. If several good options are developed, focus should be on the best and strongest. It may be so strong that negotiations are not necessary in order to be satisfied. One's relative power is suddenly immense (Fisher & Ury, 1981; Shea, 1983).

The contractor's alternatives to a negotiated agreement should also be considered. He may be overly optimistic about his options. Enjoying the advantages of lowering his expectations would be possible only if his alternatives were known. If both sides have attractive BATNAs, the best alternative for both parties may be to not negotiate. Mutual satisfaction may be better obtained through an agreement to part ways (Fisher & Ury, 1981).

Having a viable alternative to a negotiated agreement, and knowing its attractiveness, gives one the option of walking away and the knowledge to decide when. The capacity to halt negotiations gives one self-confidence and greater power to affect the outcome (Fisher & Ury, 1981; Shea, 1983).

Advance planning is highly desirable, but strategy must remain flexible. The negotiating team must be alert for the inevitable unexpected developments which occur during negotiations. It should then adjust its strategy accordingly.

## Strategic Factors

Three factors which should be given prime consideration when developing negotiation strategy are the location and climate of the

negotiation, the timing of the negotiation, and the agenda. Their impact on the outcome of negotiations is significant.

## Location and Climate

Whenever possible, negotiations should be performed at the government contract office. The person who controls the negotiating environment increases his negotiating power. This is the reason a real estate agent likes to put a client in his car rather than let the client drive. When the agent is driving he has control over where the client goes, what is seen, and when it is seen (Harris, 1983; Dawson, 1985; Nierenberg, 1971; U. S. Naval School, 1986).

The job site may be a better place for negotiations if debate over site conditions could become a major issue. However this may prove to be impractical because of the lack of adequate facilities. A preliminary fact-finding conference at the site would be nearly as useful and far more practical. In addition to the psychological advantages like power, conducting negotiations at the government contract office has other positive aspects. The pressures of time are reduced, legal and technical resources are more accessible, and higher

authority is available in the event of an impasse (Dawson, 1985; U. S. Naval School, 1986).

The physical surroundings can have direct impact on the outcome of the negotiations. The atmosphere can be made peaceful which tends to have a calming effect on a contractor, or it can be made as uncomfortable as possible in an effort to rush him into stating his lowest price. However, personal discomfort resulting from uncomfortable chairs, bright sunlight, cigar smoke, or an overheated room can turn an otherwise level-headed and cooperative discussion into an acrimonious, heated debate. Note that while it may occur, artificial manipulations to discomfort the opposition are unethical and frequently counterproductive. Spacious rooms with proper lighting, comfortable chairs, and a controlled comfortable environment will produce the best overall results. Supplies like calculators, pencils, paper, and a blackboard should also be readily available to the contractor. A separate conference room with a phone is also helpful to the contractor, but government offices are typically short on space. Arranging the conference room and its atmosphere are

an integral part of the negotiation process (Harris, 1983; Dawson, 1985; U. S. Naval School, 1986).

## Timing

Timing is important in negotiations of prime contracts as well as change orders. Negotiations that are performed before sufficient information is available handicap the government and the contractor. Without sufficient information, establishing accurate price data is impossible. This forces the contractor to raise his estimate for protection against unforeseen costs. The government will be equally unable to determine the contractor's costs, and may accept an unreasonably high price (Naval School of CEC Officers, 1974; U. S. Naval School, 1986).

On the other hand, prolonging negotiations to the point where the work is delayed or the contractor's proposal is no longer valid is not wise either. When agreement is not foreseen in the near future and further delay is not in the Government's best interest, the contractor may be authorized to proceed before a final price has been agreed upon. This is done through a *letter contract* or a *unilateral notice to proceed* for prime contracts or change orders to existing

contracts respectively. A unilateral notice to proceed is also known as a unpriced change order. There are serious drawbacks to these techniques. Once a letter contract is awarded, the contractor is in control. It is no longer feasible for the government to terminate the contractor and award to another. The contractor also has more time to accumulate cost data, and his financial risk is minimized since he is assured of receiving at least the amount of the predetermined ceiling. Realizing this, he may be less apt to make concessions during negotiations, and he may even prolong negotiations. Similarly, negotiating change orders after the work has begun transfers the cost risk from the contractor to the government and makes negotiations difficult. A notice to proceed also may create a cost-plus-a-percentage-of-cost pricing situation, which is forbidden by statute. For these reasons, it is NAVFACENGCOM policy to avoid the use of letter contracts and notices to proceed whenever possible (NAVFACENGCOM, 1985; Naval School of CEC Officers, 1974; U. S. Naval School, 1986).

Authorizing a contractor to begin work before a final price has been agreed upon has other disadvantages. The value of services

tends to change rapidly after those services have been performed (Dawson, 1985). Whether the value increases or decreases depends on which side of the negotiating table you are on. Once the work is performed, or is in the progress, the contractor remembers well the unforeseen difficulties and costs incurred. The customer, who desperately needed the work performed immediately and was willing to pay top dollar, now has the product and does not understand how it could cost so much. The customer's problem is solved and the contractor has more problems and costs than he estimated. When negotiating for the customer under these circumstances, it can be extremely difficult to arrive at a price viewed as fair and reasonable by both parties.

## Agenda

An agenda can provide the control required to ensure effective negotiations. The agenda defines the issues and helps to confine discussions to what is important and relevant. This plan can be designed to play a specific role in negotiations. For example, agenda items in labor negotiations are often organized so that the most difficult subjects of discussion occur at the exact time of a strike

vote. An agenda can also facilitate agreement by arranging the less controversial items for the beginning of the discussion. This generates a climate of success that may continue throughout the negotiations. An agenda can clarify or hide motives. It can establish rules that are fair or biased. It can keep talks on track or permit digression (Brooks & Odiorne, 1984; Jandt, 1985; Nierenberg, 1971; U. S. Naval School, 1986). "The man who controls the agenda controls what will be said and, perhaps more important, what will not be said" (Jandt, 1985, p. 5).

The agenda should contain items that both sides want to discuss, not just the government's interests. Otherwise, negotiations for the day may consist only of what items will be discussed and at what point. This can be easily accomplished by contacting the contractor prior to meeting to determine what areas he wants to discuss. Once this consideration is given, debate over the agenda is unlikely.

The strategy of including "straw" points may be helpful to the government. The team can maintain a position on these points of little or no importance until a concession is needed to promote an attitude

of cooperation by the government and success by the contractor (U. S. Naval School, 1986).

Chester L. Karrass (1974a) recommends that if the other party is the author, negotiate the agenda before talks begin. He provides the following guidelines:

> (a) Don't accept the other man's agenda without thinking through the consequences, (b) consider where and how issues can best be introduced, (c) schedule the discussion of issues to give yourself time to think, (d) study the opponents' proposed agenda for what it leaves out, (e) be careful not to imply that your "must" demands are negotiable. You can show your resolve early by not permitting such items into discussion. (p. 5,6)

An agenda is a plan, not a contract. Neither party can afford to not change what he does not like. An agenda provides control which should not be taken for granted, neither by the drafter or his opponent (Jandt, 1985; U. S. Naval School, 1986).

## Negotiating Team

The negotiating team approach to developing and carrying out strategy has proven to be very successful. For Navy negotiations which meet certain criteria, based on dollar threshold. and type of negotiation, the team is called a Contract Award and Review Board

(NAVFACENGCOM, 1985). However, whether negotiating a small change order or a major contract, a well managed team gives the government the maximum advantage to reach its goals. The success of the team is determined primarily by its size, leadership, expertise, and preparation (Brooks & Odiorne, 1984 ; Harris, 1983; NAVFACENGCOM, 1985).

Theoretically, the ideal size of a negotiating team is one. This avoids the problems of control, collaboration, and communication present in groups. But there is often the need to have more information and expertise available than one person possesses. The contracting officer, as the leader, must choose the team membership carefully. Depending on the dollar value involved and the overall importance of the negotiation, team membership may include price analysts, design engineers, auditors, and legal advisors. However, the number of team members should be limited, for all negotiations, to four or five persons. More members than this creates span of control difficulties for the leader (Harris, 1983; Scott, 1981).

The contracting officer has overall responsibility, but the team members have advisory responsibilities concerning topics in their

area of expertise and must be utilized to the greatest extent possible. This is possible if the members can conform to two requirements. The first requirement is that each member must understand and be in complete agreement with the group's goal, and be willing to put the group's goals before their own. The second requirement is that the members must be dedicated to the methods of accomplishing the team's goals. They must realize that the team leader is the *only* one that negotiates with the contractor. If any member is allowed to voice his ideas and emotions any time he feels like it, effective negotiation will be impossible. A board member may voice an idea or comment contrary to the entire strategy of the Board in the heat of debate. The main function of the team members during the negotiation is to sit, listen, evaluate, and act when called upon by the leader. More active roles may be played; for example certain strategies may call for all members to play an active role. But for the most part team members should participate in the conversation only when the leader specifically asks them to. Notes to the leader may be passed, but only if very indiscreetly in order to avoid distracting others. All statements directly or indirectly committing

the Navy must be the exclusive responsibility of the team leader. The leader must continually exercise positive control to ensure effective communications and to present a unified front. He should never hesitate to call a recess if one is necessary to regain control of the team, or of the negotiation (Harris, 1983; NFCTC, 1985; Scott, 1981; U. S. Naval School, 1986).

The team must do its homework in order to be effective. Thorough research is necessary to familiarize the team with all aspects of the proposal including scope of work and pricing. The strengths and weaknesses of the proposal should be analyzed and discussed by all members. A list of questions should be prepared to help identify the contractor's likely strategy and tactics (Graham & Yoshihiro, 1984; Johnston, 1985).

Simulation or practice sessions are also very helpful. Someone with knowledge of the contract should review the proposal and play the role of devil's advocate. This person should try to anticipate the actions and alternatives available to the contractor and act them out. This technique allows the team to see the proposal from the contractor's point of view and provides training in negotiating.

Mistakes made in practice sessions cost nothing and can be corrected. Mistakes made at the negotiating table may be extremely costly (Johnston, 1985).

## Truth-in-Negotiations Act (Public Law 87-653)

Price and cost analysis is an important step in preparation for negotiations. On the advice of the Comptroller General, Congress enacted Public Law 87-653 (Naval School of CEC Officers, 1974). This law, enacted in 1962, is also known as the Truth-in-Negotiations Act. The purpose of this law is to provide safeguards for the government against inflated cost estimates in negotiated contracts and subcontracts (Naval School of CEC Officers, 1974 p28).

Under certain circumstances, contracting officers are required to obtain cost or pricing data from offerors and the offerors are required to provide this information in support of cost proposal(Naval School of CEC Officers, 1974). The purpose of obtaining this data is to enable the government to analyze contractor's proposals when no other reliable method is available. Certification that the cost and pricing data supporting the contractor's proposal is accurate, complete, and current is required in the following circumstances:

(a) Prior to the award of any negotiated contract where the price is expected to exceed $100,000; (b) prior to the negotiation of any contract modification when the price adjustment is expected to exceed $100,000; (c) prior to the award of a subcontract at any tier where each higher subcontractor and the prime contractor have been required to furnish the certified cost or pricing data, and the price of the subcontract is expected to exceed $100,000; and (d) prior to the modification of any subcontract covered by (c) when the price adjustment is expected to exceed $100,000 (FAR, 1986 ; Naval School of CEC Officers, 1974; U. S. Naval School, 1986).

This cost and pricing data also can be required for actions between $25,000 and $100,000. However, the case for this would be highly unusual and would require justification by the contracting officer (U. S. Naval School, 1986). Certified cost or pricing data shall not be requested by the contracting officer for actions less than $25,000 in accordance with the FAR (1986).

The contractor is required to submit the proposal on a standard government form, SF1411 (FAR, 1986). The proposal must be complete enough to allow an auditor to verify cost data (FAR, 1986).

For example, the contractor must list a quotation from a particular steel company, showing the quantity and price of the steel required. The Defense Contract Audit Agency (DCAA) will verify this information when the contractor's books are audited. Once the proposal is received from the contractor, the members of the government contracting office verify that the work to be performed is accurately reflected. The proposal is then forwarded to DCAA for audit. The DCAA performs an advisory audit which attempts to substantiate the contractor's direct cost, subcontractor's quotations, wages paid to tradesmen, and the basis for overhead (NAVFACENGCOM, 1985). It is the contracting officer's responsibility to determine reasonableness of the number of manhours, material quantity, and equipment requirements (NAVFACENGCOM, 1985). This information is used as a basis for negotiations, but does not relieve the government of the responsibility for preparing an independent estimate (NAVFACENGCOM, 1985; FAR, 1986).

The contractor's data must be accurate, complete and current. If, after contract award or issue of a change, the data is found to be defective, the government has the right to a price adjustment.

However, it must be proven that the contractor failed to disclose significant and available cost or pricing data and that such failure resulted in an excessive cost to the government(FAR, 1986; Rusher, 1981). To establish that the contractor did not act in good faith would require monumental effort, and may prove to be impossible.

Proposals inevitably include judgements by the contractor concerning future costs or projections (NFCTC, 1985). If all proposal information were entirely factual, there would be no need for negotiations. These judgements are supported by factual data in the proposal, but in no way is the contractor making representations as to the accuracy of judgements concerning future costs or projections. This distinction between fact and judgement is important as it defines a major area for negotiations. The Truth-in-Negotiations Act provides the government with more data with which to negotiate, but the final price is still left open for bargaining (U. S. Naval School, 1986; Naval School of CEC Officers, 1974; NFCTC, 1985).

There are four exemptions from submission of the cost and pricing data required by the Truth-in-Negotiations Act (FAR, 1986). The contracting officer shall not require certification when it is

determined that prices are; (a) based on adequate price competition, (b) based on established catalog or market prices of commercial items sold in substantial quantities to the general public, or (c) set by law or regulations such as for utilities (FAR, 1986). Exemption is also allowed by waiver from the Secretary of the Navy (Naval School of CEC Officers, 1974).

# CHAPTER THREE
# PERFORMING THE NEGOTIATION

## Introduction

Having thoroughly prepared, the negotiating team is almost ready to engage in actual negotiations. But before negotiations begin, the process of opening the negotiation must be considered, and the stages of negotiation analyzed.

## The Opening Process

The opening of the conference is an influential phase of negotiations (Winkler, 1984). The pattern and possibilities of negotiations will be established in the first few moments of meeting. In order to take full advantage of this period one must look at why this period is so influential, the purpose of the opening, and how the objectives of the negotiations are influenced by the opening procedures.

The opening of the conference is a critical period because of its influence on the entire negotiating process and results (Scott, 1981). Energy and concentration are at a natural high point. Everyone is concentrating. A long monologue at this time will lose everyone's attention and the momentum of the conference. The manner of the

opening as well as what is said can significantly influence the success of negotiations (Scott, 1981, Shea, 1983; Winkler, 1984).

The opening's purpose is to develop understanding, interest, and support (Scott, 1981). It is the responsibility of the host team leader, usually the government team leader, to open the conference (NFCTC, 1985). The opening statement should consist of background information which defines the problem or nature of the negotiation topic, the principles and objectives of the meeting, and the procedure for reaching these objectives (Shea, 1983, U. S. Naval School, 1986). "The opening statement can determine whether the meeting will be orderly and productive or confused and misguided" (NFCTC, 1985, p. 3-2).

The opening procedure influences the team's ability to achieve its negotiation objectives. The procedure is not restricted to thoughts and actions which occur while sitting at the negotiating table. Many factors influential to the negotiation process and results must be considered before negotiations begin. Punctuality, personal appearance, avoidance of interruptions, and setting the stage develop the meeting's climate (U. S. Naval School, 1986). When handled

correctly, these factors can create a cordial, cooperative, and businesslike atmosphere (NFCTC, 1985, Scott, 1981, Shea, 1983, U. S. Naval School, 1986).

The government, most commonly the host, must ensure that all members are prompt. Ideally all government members will arrive before the contractor. This shows professionalism and respect for the contractor's time. A contractor kept waiting is not likely to be cooperative, especially if he has traveled a long distance. Tardiness may also be used to gain advantage (U. S. Naval School, 1986). If the contractor is late it may be to the team's advantage to indicate its displeasure either directly or by mild inference. The contractor can also attempt to use the Government's tardiness as a tactic to irritate or obligate. A countermeasure to this is to ignore his attempt or indicate it makes no difference to the team (NFCTC, 1985, Scott, 1981, Shea, 1983, U. S. Naval School, 1986).

Personal appearance is an essential part of gaining the mutual respect which is the foundation of successful negotiations (NFCTC, 1985). All members must present a neat and well groomed appearance. The military members on the team should wear their

uniform, a universal symbol of respect and authority (NFCTC, 1985; U. S. Naval School, 1986).

Outside interruptions of the meeting must be kept to a minimum and avoided entirely when possible (NFCTC, 1985). Interruptions are irritating and disruptive, even if they pertain directly to the negotiation. Similarly, it is essential, but not always practical, that team members "clear their calendars" for the periods immediately prior to and after the meeting. This allows members to arrive on time, concentrate on the subject of the meeting, and not be rushed to adjourn in order to attend another meeting. Conversely, if the contractor is concentrating on other matters and hurried by other commitments the team should be aware and take advantage. He may be willing to accept many of the team's demands just to bring the conference to a close (NFCTC, 1985; Winkler, 1984).

Setting the stage refers to the formalities which must be attended to and the process of establishing a favorable negotiating base immediately prior to the negotiations (U. S. Naval School, 1986). The formalities include greetings and introductions. Establishing a foundation involves setting ground rules, establishing power and

authority, and creating a sense of objectivity and fairness (NFCTC, 1985; U. S. Naval School, 1986).

Introduce all team members by their full name and title. with emphasis on their expertise and experience, when favorable. This should be done before the conference begins or at the very beginning (NFCTC, 1985). Pleasant greetings and an expression of appreciation for punctuality and attendance are helpful (NFCTC, 1985; U. S. Naval School, 1986).

Establishing the negotiating authority of the opponent's team leader is important (U. S. Naval School, 1986). If the contractor's representative does not have the authority to bind the contractor, successful negotiation becomes impossible. Frustration will dominate the climate if every time a final decision must be made the other side tries to hide behind "it looks good to me but my boss has final approval" or "I could never get my boss to agree to that!" Under these circumstance the contractor's representative is nothing more than a messenger boy and the team can not negotiate with him seriously (NFCTC, 1985; U. S. Naval School, 1986).

The team leader can create a sense of objectivity and fairness through his opening remarks (NFCTC, 1985). It should be stressed that although both sides will be striving to obtain the most favorable deal possible, it is not in the interest of either party to enter into an agreement that is obviously unfair or prejudicial to the interests of the other (U. S. Naval School, 1986). It is important that the contractor know he is dealing with someone who is honest and whose word can be relied on. The contractor should be assured of the Government's intention to make every effort to be objective and its expectation of the contractor to do the same, emphasizing that only then will it be possible to work out a mutually acceptable agreement (NFCTC, 1985; U. S. Naval School, 1986; Winkler, 1984).

## Phases of Negotiation

At this point in the negotiating process, a cordial, cooperative, and businesslike atmosphere has been established for reaching the team's objectives. Tensions have been eased and the members are in a positive frame of mind. The major issues and objectives must now be established with certainty (Dawson, 1985). Assumptions must be examined (NFCTC, 1985). Current, more complete, information must

be gathered about the other party (NFCTC, 1985). Finally, a mutually satisfactory agreement must be sought and hopefully obtained (Dawson, 1985; NFCTC, 1985; Scott, 1981; U. S. Naval School, 1986).

The period of negotiation which begins as the members sit down at the negotiating table can be separated into two phases, *exploratory* and *agreement*. In the exploratory phase, assumptions are examined, issues and objectives are clarified and information about the contractor is gathered (Dawson, 1985). The agreement, or negotiation, phase includes battling for position, concessions, and final agreement (Dawson, 1985; U. S. Naval School, 1986).

Exploratory Phase

As many assumptions as possible must be validated during the exploratory phase. The negotiating team's price objectives, its diagnosis of the issues, and its strategies are based upon preliminary information obtained from the contractor's proposal or various other sources (U. S. Naval School, 1986). It is risky to rely on this information as factual, and may be costly (NFCTC, 1985).

The contractor's position must also be established (Harris, 1983). The issues and objectives that are important to him must be

discovered. Once it is known what will satisfy the contractor, it will be much easier to satisfy him while bargaining to the Government's advantage. If the issues and objectives are not well defined, much unnecessary negotiating may occur. Fisher and Ury, in Getting to Yes (1981), relate a story of two sisters who quarreled over an orange. Eventually the sisters divided the orange in half. One sister ate the fruit from her half and threw the peel away. The other sister threw away the fruit of her half and used the peel in baking a cake. Failure to define the issues and objectives, or more simply the problem, lead to needless negotiations and arguments, and a poor solution (Fisher & Ury, 1981). Information that may not have anything to do with the contractor's demands or objectives should also be gathered (NFCTC, 1985). Who is this person? What motivates him to make his demands? This "unrelated" information may help the government tailor its strategies to better meet the contractor's objectives, and therefore its own (Dawson, 1985; Jandt, 1985; NFCTC, 1985; U. S. Naval School, 1986). The method for reaching the many goals of the exploratory phase is questioning, "pointed and unflagging inquisitiveness" (U. S. Naval School, 1986, p. 5-25).

Questions and discussions of the exploratory phase should be planned on the basis of reaching the goals just mentioned. Inconsistencies between information gathered from government sources and that received from the contractor should be specifically addressed. The process involves *questioning* , *probing* , and *active listening* (Dawson, 1985; U. S. Naval School, 1986). Care should be taken that the questioning does not lead to argumentation. This would destroy the purpose of the exploratory session; to gain information (Dawson, 1985; NFCTC, 1985; U. S. Naval School, 1986).

When questioning, the team should not be satisfied with vague or guarded answers. Most contractors are aware that the less specific the knowledge of the government team, the more easily their judgement can be influenced. A contractor may pass over a vulnerable point by presenting an abundance of information to misdirect the team's thinking or by making sweeping generalizations which , in themselves, are true but are not pertinent to the point at hand. For example, in defending his estimate for roofing a building, the contractor may continually say, "roofing costs are more expensive than ever before for everybody." This statement may be true, but it

does not tell the team what it needs to know. The team must determine if the costs are higher, why, and by how much. These answers can by found by probing (Dawson, 1985; Jandt, 1985; NFCTC, 1985; U. S. Naval School, 1986).

Probing is a technique where a series of questions concerning the same subject matter is asked (U. S. Naval School, 1986). Each successive question digs in deeper in an attempt to pry an adequate answer. If an answer is not satisfactory, the question can be asked in another way or even postponed awhile and asked again. The process should be continued until an adequate answer is received or the contractor explains why an adequate answer is not being given (Dawson, 1985; Jandt, 1985; NFCTC, 1985; U. S. Naval School, 1986).

Active listening, or rephrasing the contractor's point, improves understanding (U. S. Naval School, 1986). By rephrasing the point and asking whether one's understanding is correct avoids differences of interpretation and also commits the contractor to an interpretation. This also prevents the contractor from later changing his interpretation to his advantage (NFCTC, 1985).

It must be remembered by all members of the team that the exploratory session is strictly exploratory. It is tempting to counter a contractor's position during the questioning period. Suddenly, in the middle of fact-finding, the team finds itself in the midst of negotiating. Much needed information has not been obtained, and organization and strategy are destroyed. The hours of planning and preparation can be wasted if this stage is not restricted to exploration (Dawson, 1985; NFCTC, 1985).

The exploratory phase should not close until all assumptions have been tested, issues and objectives are clarified and their relative importance to the contractor is established, and the basis for the contractor's position on these is determined. When these goals are accomplished, a recess should be called to reassess the Government's positions, issues, and strategy (NFCTC, 1985; Scott, 1981).

## Agreement Phase

The agreement session, the final phase, is the most crucial of the performance phases (Dawson, 1985). The exploratory phase has been completed and both parties are ready to forge an agreement that

satisfies their needs. The dilemma is finding the option that will satisfy both parties, or at least one that both parties will agree to. Each side has its own range of acceptable solutions. If the two ranges overlap as agreement is approached, a solution acceptable to both parties may be found. The goal of negotiations is to find the point where each side believes it has gained more than it has yielded. In order to reach agreement, movement towards this point is necessary. Ideally this movement will be done by the other side. Three ways to get the other side to move are through *domination* , *compromise* , and *concessions* (NFCTC, 1985).

Domination is the use of all advantages to win victory over the contractor (NFCTC, 1985). The team's attitude is one of stubbornness and of victory at the expense of the contractor. All movement is expected to be done by the contractor. The strategy is to emphasize and attack the contractor's weaknesses, taking advantage where possible, in order to build strength. This method is often used by sole source contractors because of their position of economic strength. The government may also be put in the position to use this approach when it is the only buyer of the contractor's product. Domination

requires sacrifice by the contractor, which does not result in a fair and reasonable agreement. Victory may be sweet for the moment, but this method of negotiation gives poor long term results. A contractor who has been taken advantage of will be looking to even the score, either during performance of the current contract or at the negotiating table of future contracts (NFCTC, 1985).

Compromise involves moving toward agreement on the basis of arbitrary position changes (NFCTC, 1985). The result may be an agreement where neither party is satisfied. An example of an arbitrary position change is splitting the difference. This often happens when one or both of the negotiators is tired and is in a rush to come to an agreement. The agreement which results from this movement has no justification, at least not a justification that is based on the issues and objectives as it should be. An agreement reached by compromise is looked upon with suspicion and disapproval because of its arbitrary basis (NFCTC, 1985).

The preferred approach for moving toward agreement in government contracting is the concessions method (NFCTC, 1985). Making concessions is based on a reason and justification for every

change in position. The negotiators concentrate on giving the other side justification for changing as well as on selling their own position. Concession is then the process of yielding to superior points of reason (NFCTC, 1985). Each side offers its reasons for position changes which provides the forum for finding a mutually satisfying agreement. Under these circumstances, yielding positions is not a sign of weakness or of being arbitrary. Changes in position are justified by the method of negotiation they are based upon, concession (NFCTC, 1985).

There are many roads to reaching an agreement. The road taken is determined by the situation, and one's mental attitude, knowledge, proficiency, and ethics.

# CHAPTER FOUR
# MENTAL ATTITUDE AND APPROACH

## Introduction

One's mental attitude and method of approach to negotiations can effect the outcome as much as preparation and strategy combined (Karrass, 1974b). Philosophies of negotiating are numerous and varied. These pages will cover the most relevant philosophies, and methods of approaching negotiations with these philosophies in mind.

The importance of high aspirations in negotiations has been proven in scientific experiments (Karrass, 1985; Karrass, 1970). At Harvard Graduate School of Business Administration researchers conducted an experiment with hundreds of people (Karrass, 1985). The purpose was to determine whether those people who aim higher get better results from negotiations. The people negotiated two at a time-one coming in one door, the other coming in the other door. Instructions to the bargainers in the experiment were identical, with the exception of the negotiation results expected of them. Half were told the typical negotiator in their position got $7.50 and the other half believed $2.50. The result was not an overall average of $5.00 as might be expected. Those that aimed for $7.50 received about that.

Those who aimed for $2.50 got about $2.50. In an experiment done by Chester L. Karass, phD (1970), 120 professional negotiators were paired off to negotiate a lawsuit (Karrass, 1970). Those who aimed for settlement of $700,000 or more averaged $650,000. Those who aimed for less than a $700,000 settlement averaged only $425,000. High aspirations give high results .

Negotiations should not be approached too seriously (Dawson, 1985). If one cares too much, he puts himself under unnecessary pressure and stress. The worst person one can negotiate for is himself. Approaching negotiations as if one's life will end or job will be lost if results are not satisfactory is handicapping. When one negotiates for someone else, he tends to be more objective and relaxed (Dawson, 1985). Negotiations can be approached as a challenging game, with superior results. A positive attitude will reflect a resulting feeling of power and confidence. Stress will be lower and energy higher. Doing one's best is a must, but worrying about the outcome can lose the battle before it begins (Cohen, 1980).

The Navy negotiator has the advantage of negotiating for someone else, the government. With the right attitude, the Navy

negotiator can have a distinct advantage over a contractor who must negotiate for himself. The contractor who cannot step back for an objective view would be wise to hire an impartial negotiator (Cohen, 1980).

## Communication

Negotiation is the process of communicating for the purpose of reaching agreement. One's approach to communication can significantly effect the outcome of negotiations. Communicating is difficult even for those with similar backgrounds and values. Communications between persons who not only do not know each other, but may also feel hostile and suspicious of one another, compounds the problem. Fisher and Ury (1981) divide communication problems into three major areas; (a) *playing to the gallery* , (b) *paying attention* , and (c) *misunderstanding* .

Negotiators sometimes give up in their attempts to persuade the other side out of frustration in not reaching their goals. They resort to merely trying to impress third parties or their own team. "Rather than trying to dance with their negotiating partner toward a mutually agreeable outcome, they try to trip him up" (Fisher & Ury, 1981, p.

33). This playing to the gallery is wasted effort. There is more effort put into impressing third parties than into convincing the opposing party to take a constructive step towards agreement (Fisher & Ury, 1981).

Paying attention to exactly what the other person is saying is difficult, but necessary for effective negotiating. The tendency is to think about what one is going to say next, what strategy should be used next, or what the rest of the team is thinking, rather than to listen attentively to the other side. Without hearing what the other side is saying, there can be no communication (Fisher & Ury, 1981).

Misunderstanding is the third communication problem. Hearing the other person's words are only part of understanding his meaning. Misinterpretation is common because every word means something a little different to each person. It is important to understand what is meant by the words, not just what is said (Fisher & Ury, 1981).

Much can be done to mitigate these communication problems. Active listening is an easy but very effective communication technique. Paying close attention with an occasional interruption to say, "Do I correctly understand that you are saying...?" will aid

understanding. It will also give the other side the satisfaction of knowing they were heard and understood. This is a cheap but powerful concession. Knowing he was understood, will encourage him to listen rather than concentrate on how to get his point across. Repeating in a positive manner what one understands the other party to mean is an effective negotiating tool. Unless the other party believes that their point of view is understood perfectly, they will not be receptive to other viewpoints. Understanding the other party and the merits of their arguments is not agreeing with them; it is the path to mutual agreement (Fisher & Ury, 1981).

Speaking to be understood by the other party is important to effective communication. A negotiation is not a debate or trial. The only ones who need to be persuaded are the opposing party. Blaming a problem on another person, name calling, or raising one's voice may impress spectators or other team members, but it will not help the opposing party to understand one's point of view (Fisher & Ury, 1981).

Non-aggressive "I" statements are more effective in communicating disagreement than offensive "you" statements. Describing a problem in terms of its impact on oneself is more

persuasive than in terms of what the other person did or why. Saying, "that is not what I understood you to mean" is much less offensive than "you lied to me." The same information is conveyed. Offensive statements promote anger and direct attention away from the goal of agreement, rather than promote communications (Fisher & Ury, 1981).

## Ethics

The highest standards of personal conduct are expected of all government personnel because of their position of public trust. The business ethics of government personnel who administrate and expend government funds "must be above reproach" (U. S. Naval School, 1986, p. 5-29). However this does not mean that one must naively approach each negotiation with all the cards showing (Cohen, 1980;Dawson, 1985).

Walking the fine line between ethics and good negotiating skills is not easy. A frame of reference is crucial to determining whether actions are ethical. A good negotiator is not unethical if he uses his negotiating skills against another experienced player. But when "Honest John" at the car dealership uses those same tactics against "Grandma Smith", he is being unethical. People should be dealt with

based on their frame of reference. Taking advantage of someone is unethical, but allowing others to take advantage is not upholding one's position of public trust (Cohen, 1980; Dawson, 1985; Winkler, 1984).

Good negotiators do not reveal all of their hand. They do not tell the complete story of what they want or why they want it. Doing so would encourage the other party to take advantage and push for maximum concessions. Instead they reveal information in small pieces, and only when necessary. The smart negotiator will not reveal the pressures he is working under, deadlines, or any other information which will give advantage to the other person. This does not make him a liar or cheat. It is only prudent to protect one's position (Cohen, 1980; Dawson, 1985; Winkler, 1984).

A negotiator must maintain his integrity. His word must be as binding as a signed contract. If the other party distrusts the negotiator he becomes nervous and suspicious. Concessions are nearly impossible in a distrustful atmosphere. Suspicious people do not negotiate well; they demand more guarantees and more concessions (Winkler, 1984).

## Win-Win Negotiating

The purpose of negotiation is to reach an economic agreement where each side believes it has gained more than it has yielded (Jandt, 1985; NFCTC, 1985; Rusher, 1981). This is possible only because different people value things differently. Additionally, each negotiator has his own needs, wants and motivators. Intangibles such as ego, company goals, and innate competitiveness complicate the path to agreement, but they also provide the possibility that both sides can walk away from the negotiating table a winner. In a win-win negotiation, the goal is to find a solution that provides acceptable gain to all parties (Jandt, 1985).

Why is win-win negotiating desirable? Most people have been taught to strive for victory, sometimes at all costs. The extremists may adopt the philosophy of the late football coach, Vince Lombardi, who said, "Winning isn't everything, it's the only thing" (Scott, 1981). By this standard, there is only one satisfied person, the winner. However, there are hidden hazards to winning in contract negotiations if the other party feels that they are the loser. The loser may feel offended, injured, or wronged. The loser may avoid future dealings or

even seek to "get even" for the loss. The winner has won a battle but he may lose the war.

Aside from the pragmatic reasons, there are ethical reasons to strive for a win-win negotiation (Jandt, 1985). Winning at all costs jeopardizes the Government's requirement for standards "above reproach". This "cutthroat" attitude is also in conflict with the personal ethics of many, and may leave them feeling like a loser no matter what the negotiation results (U. S. Naval School, 1986, p. 5-29).

Satisfying the other party, as well as oneself, is a goal of win-win negotiating (Jandt, 1985; Karrass, 1985). People's real needs are seldom what they seem to be, because the negotiators try to conceal them or do not recognize them. Underneath the discussions of price, products, services, money, or whatever, there are psychological needs (Jandt, 1985; Karrass, 1985). These can be satisfied by the proper approach to negotiations. A person's manner, tone of voice, attitude, methods, and concern for the other side, contribute to meeting the other parties needs (Jandt, 1985; Karrass, 1985; NFCTC,1985). The process one uses to obtain his objectives may also

meet some of the other parties needs. *Principled negotiation* is Fisher and Ury's (1981) process for win-win negotiations (Cohen, 1980; Fisher & Ury, 1981).

Roger Dawson (1985) established five standards to help determine not only whether a negotiation was won or lost, but how the game was played. These can be used to judge negotiations for win-win results.

The first standard is apparent; does everyone involved consider himself a winner? If the other party leaves the negotiation table thinking they have been talked out of everything, it has not been a good negotiation. Both parties should feel that they have accomplished something important and satisfying.

The second benchmark is the feeling that both sides have each listened to and considered the objectives of the other. This concern for the other parties' needs creates an atmosphere of communication in which a win-win settlement can be reached.

The belief that each side conducted negotiations fairly is the third standard of judgement. Playing by the rules prevents the feeling of betrayal which causes negotiations to suffer. Both parties should

leave the negotiations with the attitude that the other side was tough, and they fought hard, but they were fair in the way they conducted negotiations.

If each negotiator feels that he would enjoy dealing with the other in the future, the fourth benchmark has been met. If the process of dealing with each other was challenging and enjoyable, the negotiations were conducted fairly and well.

The belief by each party that the other party is determined to uphold the conditions of the agreement is the fifth standard of judgement. If either side feels that the other will back down on his commitments, given the opportunity, then the negotiation was not a win-win negotiation.

Roger Dawson's (1985) accurate definition of a win-win negotiator is a "person who can get what he wants out of a negotiation and still bring himself up to the standards established by those benchmarks" (p. 225). This is also true of a person who practices Fisher and Ury's (1981) principled negotiation.

## Principled Negotiation

The method of principled negotiation, developed by the Harvard Negotiation Project, is an alternative to "hard" and "soft" positional bargaining (Fisher & Ury, 1981). Principled negotiation is a way of deciding issues on merits rather than through threats or haggling. Opportunities for mutual gains are explored. Where interests conflict, results are based on objective criteria rather than who can present the best case or hold out the longest. Principled negotiation focuses on fairness and protection from those who would take advantage of one's efforts to be fair (Fisher & Ury, 1981).

In positional bargaining, an extreme position is taken and stubbornly held onto. The other party is not allowed to know one's true views, needs, and goals. Small concessions are made only when necessary to keep the negotiations going. When both sides behave this way, time is spent haggling rather meeting the true needs of each side (Jandt, 1985; Fisher & Ury, 1981).

Fisher and Ury (1981) argue that one should not bargain over positions. Positional bargainers make demands (their positions), argue them, and measure their success in terms of how much their

opponents will give in to those demands. One side or the other wins. The closest one can come to a "win-win" result is a *split the difference* compromise where no one really wins. This does not meet the goal of negotiation, a "wise agreement" (Fisher & Ury, 1981, p. 4). A "wise agreement" is one "which meets the legitimate interests of each side to the extent possible, resolves conflicting interests fairly, is durable, and takes community interests into account" (Fisher & Ury, 1981, p. 4). Fisher and Ury (1981) offer three criteria for judging any method of negotiation; (a) "it should produce a wise agreement if agreement is possible"; (b) "it should be efficient", and (c) "it should improve or at least not damage the relationship between the parties" (p. 4). Principled negotiation, as an alternative to positional bargaining, meets these criteria.

Negotiating over positions tends to stifle creativity. "As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties" (Fisher & Ury, 1981, p. 5). Agreement becomes difficult. If agreement is reached it may be a result of splitting the difference rather than a solution designed to skillfully meet and satisfy the legitimate interests of the parties.

The result is neither party is as satisfied as it could have been (Fisher & Ury, 1981).

Principled negotiation is Fisher and Ury's (1981) alternative to positional bargaining. Their "negotiation on the merits" (Fisher & Ury, 1981, p. 11) has four basic parts:

(a) People: Separate the people from the problem;
(b) criteria: Insist that the result be based on some objective standard;
(c) interests: Focus on interests, not positions;
(d) options: Generate a variety of possibilities before deciding what to do.

Principled negotiation is not always practical, but it is a substantial improvement over positional bargaining. Each of the four basic parts of principled negotiation has positive and negative aspects. Humans are emotional and often possess radically different views. People's egos become identified with their positions (Scott, 1981). Separating the people from the problem is not always possible. They often are the problem. Fisher and Ury's suggestions to get the participants "to see themselves as working side by side, attacking the problem, not each other" (Fisher & Ury, 1981, p. 11), and

"to deal with people as human beings and with the problem on its merits" (p. 40), which are excellent suggestions.

Objective criteria "independent of the naked will of either side" (Fisher & Ury, 1981, p.11), such as "market value, expert opinion, or custom or law" (Fisher & Ury, 1981, p. 11) is not always available to determine the outcome of negotiations. But using objective criteria is another excellent idea when feasible.

Focusing on satisfying people's underlying interests, their true interests, rather than their stated positions is the subject of the third point. For example, when a contractor negotiating an indefinite quantity contract insists on a certain price, why does he need that price? Is it the risk he anticipates? Will the price be less if there were a guaranteed minimum? Maybe allowing him to erect a storage shed on site to reduce travel costs would satisfy him. Discovering the contractor's motivating interests may reveal alternative positions which satisfy eveyone's interests (Fisher & Ury, 1981).

Inventing options for mutual gain before deciding what to do increases the chance of meeting the interests of both sides. Negotiators often end up like the earlier example of the sisters who

quarreled over the orange. One wanted the fruit, the other the peel. If the options had been examined, each would have had the whole fruit or the whole peel rather than only half of each. Depersonalizing the negotiations, substituting interests for positions, inventing options before deciding, and searching for objective standards for solutions can result in a productive, rewarding, and mutually satisfying negotiation without personal attacks (Fisher & Ury, 1981). In other words, a win-win negotiation.

# CHAPTER FIVE
# TACTICS

## Introduction

Tactical planning is used to reach short-range goals. Short-range goals are included in a larger plan, strategy. Strategy is long-range planning concerned with obtaining long-range goals. Tactics are the short-run methods and procedures used to reach the long range goals of strategy (Karrass, 1970; NFCTC, 1985).

Tactics are an inherent part of negotiating. Using tactics is not unethical or even against the theory of win-win negotiation. The factors determining whether a tactic is ethical are how and why the tactics are used, and of course, the ethics of the observer. Even if one does not use tactics, it is necessary to understand the dynamics and reasoning behind them, as well as how to counter them. Because, whether the reader uses them or not, they will be used against him (Dawson, 1985; Karrass, 1970; Shea, 1983).

Tactics can be divided into two areas, maneuvers and techniques. A maneuver is a move or ploy designed to secure a position of advantage. Techniques can be thought of as tools or weapons in an arsenal. Time and silence are two powerful techniques. If used properly, tactics can provide a source of power at the

negotiating table. If used improperly, they can be counter productive and create needless hostility (Dawson, 1985; Karrass, 1970; Karrass, 1974b).

## Maneuvers

The following maneuvers are common to government/contractor negotiations. They are arranged according to the stage of negotiation in which they are most likely to be used.

### Beginning maneuvers

#### You Will Have to Do Better Than That

These eight effective words "you will have to do better than that" can be used by the government or the contractor. Immediate pressure is applied to the receiver to do just that, better. Demonstrated by the names this phrase is called, such as "The Vise" (Dawson, 1985, p. 43) and "The Krunch", is power (Karrass, 1974b, p. 90). Why does it work so well? Estimating is not a science, there is always room for improvement. Honest estimators differ in their interpretation of work, methods of accomplishing work, and the costs of labor, equipment and material. Profit margins can be changed. Neither side knows the exact cost or price of a job or piece of work.

Pressure can be applied on the other side. For an effective countermeasure, the proper response is required. Roger Dawson's (1985) response would be an excellent choice: "And just how much better do I have to do?" (p. 43). This response puts the ball in the opponent's court and defuses the pressure.

Discomfort

Negotiations should be conducted at the government office whenever possible. However, there may be times when using the contractors facilities is necessary. A contractor who does not view negotiations in a win-win manner may attempt to cause discomfort for the government representatives. The object of this discomfort being to wear the representatives out and to lower their resistance. The following are examples of unpleasant conditions sometimes created to cause discomfort; (a) providing a wobbly chair, (b) positioning the chair facing the sun, (c) cigar or cigarette smoke, (d) personal attack, (e) constant interruptions, and (f) poor ventilation (Karrass, 1974b). Confronting persons who employ these tactics will usually cause them to back off. If necessary, contact the superior of the person you are dealing with. Never accept poor treatment. It will

only lead to increased abuse later (Dawson, 1985; Jandt, 1985; Karrass, 1974b).

The discomfort tactic is not used by a win-win negotiator. It is not recommended for use by government representatives. An opponent who is made to feel uncomfortable may be aware of what is happening and resent it. He will try to get even the first chance he gets.

The Flinch

Flinching is easy and effective. It is a visible reaction to a quoted price or proposal (Dawson, 1985). Shock or disbelief at what the contractor says can quickly improve one's situation. A reason for the reaction may not even be required, especially if the contractor is trying to determine the Government's limits by throwing out proposals to test reactions. Defusing responses to this maneuver would be to remain calm while the contractor gyrates in disbelief, to act shocked at his disbelief, or even to laugh (Dawson, 1985).

Start high/low

Leave room for negotiation. Ask for more than expected, but imply flexibility. Do not make a "take it or leave it" stance. This position defeats the purpose of negotiations. If one begins with his

best deal, there is no room to make concessions. Without concessions by the government, the contractor will feel forced into a poor deal no matter how fair the offer. There must be an atmosphere of agreeability, otherwise one of party will leave dissatisfied (Dawson, 1985; Winkler, 1984).

Never Jump At the First Offer

People put greater value on things that are harder to come by. If the first deal offered is accepted, the contractor will immediately feel he made a mistake. This is true no matter how good the deal. The contractor may even withdraw his offer. The contractor is there to negotiate. Therefore he will not be satisfied unless negotiations occur. Also, if his first offer exceeds the Government's goals and is accepted immediately, someone has probably made a mistake. An atmosphere of agreeability is important, but not to extremes. The contractor will be far more satisfied after negotiations if he has worked for the results, regardless of the price (Dawson, 1985; Karrass, 1985).

What If...?

*What if* is a constructive tactic that can lead to mutual reward (Scott, 1981). Often ask such questions as,"how would the unit price be effected if the number of buildings to be cleaned was doubled?" or "would providing extra storage area and a private road reduce the price any?" Questions such as these help to determine where the contractor's interests and costs lie. This tactic is effective in determining what is necessary to satisfy the contractor. If the contractor uses it, all the better (Scott, 1981).

## Middle maneuvers

Higher Authority

The contractor's authority to make an agreement should be determined before any concessions are made. It is important to distinguish between the authority to negotiate and the authority to make an agreement. This is important because it prevents creating a higher authority as a stalling maneuver when under pressure. Or the higher authority, whether he exists or not, can also be be used to improve the agreement for the contractor. If, as negotiations are coming to a close, the contractor insists that a "higher authority"

must approve the deal,then insist that the person be identified and contacted immediately. However, this can be difficult if the higher authority is more than one person such as a committee. Government representatives can also use this tactic to their advantage: When feeling that the agreement is not all it could be, they are also able to fall back on "the bosses' approval is required before final agreement." from this perspective, the negotiator who enters a negotiation as the obvious authority for his side is at a severe disadvantage (Cohen, 1980; Dawson, 1985; Jandt, 1985).

Splitting the Difference

The following scenario will be familiar to anyone who has negotiated formally: An agreement has almost been reached. Both parties insist they can go no further, but there is still a difference in price. The end is in sight. When faced with this situation, stress to the contractor the small difference that separates the two offers and the amount of time that has been invested in the negotiation. Repeat this as necessary. If the contractor responds with an offer to split the difference, do not say yes. By offering to split the difference, the contractor has admitted that he can change his price. Thereby,

establishing a new low price. The government is now in control and has the opportunity to do better than fifty-fifty. If the contractor is using this tactic, resist all temptation to say "why don't we just split the difference". He will eventually try something else (Dawson, 1985; Karrass, 1974b).

Trading concessions

Do not give any concessions unless a concession will be given in return. Every time the contractor requests a concession, say,"If I do that for you, what will I get in return?" Roger Dawson (1985) gives three good reasons for "being so miserly in (one's) expectations" (p. 60). First, concessions that are needed may be given freely without having to ask. The contractor not knowing the concession's importance, since it has not been requested, leaves the government open to request even more. The second advantage is the elevation in value of the concession. Even when the concession is inconsequential, a price is put on the concession and the value is increased. The final benefit of trading "one for one" is that it stops the contractor from constantly asking for "just one more thing". If he knows that every time he gets something he must give something, he will think twice

about trying to get "just a little bit more" (Dawson, 1985; Jandt, 1985).

Playing Dumb

Playing dumb can be smart. Acting dumb defuses the competitive spirit. A competitive negotiation is impossible when one of the parties is saying,"Gee, I am not sure. What do you think?" Columbo, the television detective used this maneuver. He appeared so "dumb and helpless" that the murderers took him for granted and ended up helping him to solve the cases. Once the contractor is no longer "fighting", he will be willing to help the "dumb, helpless" government representative. Concessions are easier with the competitive spirit defused. Also, while helping, the contractor may reveal much he intended to keep hidden (Jandt, 1985; Karrass, 1974b).

If the contractor plays dumb, attempt to keep moving. Go to other issues. Explain again later in negotiations. If he continues to pretend ignorance, remember to remain competitive and do not help him gain an advantage (NFCTC, 1986).

The Hot Potato

Whenever one negotiator has a problem he will try to throw it into the lap of his opponent, trying to force the other party to solve the problem. This tactic may be used as a variation of the higher authority tactic. The contractor may agree to the terms of the deal, but claims his superior will never agree to it . He then tries for concessions based on what his superior will agree to, putting the "hot Potato" into his opponents lap. The contractor wants the government to solve his problem. Getting his superior to agree is the contractor's problem, not the Government's. The contractor's claim should be tested. Insist on taking the problem to his superior immediately if the contractor appears to be bluffing. Watch for the hot Potato, whatever the problem. Refuse to let the contractor's problems become the Government's problem (Dawson, 1985).

Ending maneuvers

The Nibble

Just as negotiations are coming to a close and everyone seems satisfied and ready to go home, the contractor makes a request for more concessions. This is an attempt to take advantage of the

Government's impatience and vulnerability after a long, hard negotiation. He may say, "our deal does include free utilities, doesn't it?", or "quality control won't be required on this additional work, will it?" or some other relatively small request that should have been discussed during negotiations. This tactic is common when negotiating change orders because the work is not as well defined as that in the contract. The most effective response is to make the nibbler feel slightly ashamed for using the maneuver. The tactic is chintzy, and the contractor is probably feeling a little guilty already. That can be used to take advantage. A smile and a remark of surprise that he would try such a thing after negotiating so fairly to this point should suffice. If not, be more direct. The contractor's attempts should not be taken seriously or allowed to spoil a good deal. If he continues to nibble, remember to ask, "if I do this for you, what will I get in return?" Patience will wear him down. Nibbles are usually short lived attempts to get what the nibbler calls "just one more insignificant concession" (Dawson, 1985; Karrass, 1974b; NFCTC, 1986).

Deadlines

Deadlines can be used as a maneuver to force agreement. The contractor may insist that he can not miss a certain plane or that the profit is not worth the time he is spending on negotiations. If he insists on a deadline, call his bluff. If there is no settlement by the deadline, there are three options. Negotiations can continue; they can be continued later; or another source can be found. If the work is a change to an existing contract, a unilateral change can be issued for work to begin and negotiations to continue later (Jandt, 1985; NFCTC, 1986; Scott, 1981).

Take It or Leave It

A contractor may use "take it or leave it" tactic for many reasons. He may be trying to intimidate the government representative. He may be bluffing. Or he may have been pushed too far. A counter to this is to isolate and define the problem. It may be easily solved. Or even better, set aside the issue for a moment. Momentum can be restored by concentrating on minor points, particularly if the government is willing to make concessions. A recess may ease the pressure. Make small concessions. Ignoring the

remark may work, particularly if a willingness to work towards agreement is shown. If none of these counters work, try to negotiate with the contractor's superior. If that does not work, there are other sources in almost every situation (Karrass, 1974b; NFCTC, 1986).

Good Guy/Bad Guy

This maneuver is common in old detective movies as well as in negotiations. The contractor's team opens with the bad guy doing all the talking. He makes unreasonable demands and expects the world on a silver platter, delivered, free of charge. He is often obnoxious and irritating. After some time he will stop talking or even stalk out of the negotiations with the good guy at his heels begging him to be reasonable. Once the good guy begins to talk, his demands sound very reasonable compared to his partner's. He is a pleasure to deal with and may cause the government to drop their guard or to relax their competitive spirit. An effective counter to this tactic is to relax without arguing. Just sit and listen. When the time comes, begin negotiations with the good guy. Otherwise, the tough demands made softly by the good guy may seem attractive in relation to his partner's demands (Karrass, 1974b; Karrass, 1985).

The Decoy

Decoys are used as lures in hunting. The decoy gives the birds a false sense of security. As they fly to join their feathered friends, they are drawn into firing range. The decoy diverts attention away from the real issue-the hunter and his gun. Using a decoy in negotiations is playing dirty.

When using a decoy, the contractor will first raise, and then elevate and exaggerate the importance of an issue to take attention away from the real issue. The contractor may insist that he start work each day two hours before the security office opens. He may have no intention of doing so, if granted. When the time is right, he will agree to begin work when security is there to open the site, but only for a price. The contractor has created a bargaining chip out of thin air. If a decoy is suspected, concentrate on the real issue and dismiss the spurious issue without giving any concessions (Dawson, 1985; Scott, 1981; Karrass, 1974b).

## Techniques

Techniques are negotiating tools. Time, and forms of non-verbal communication such as body language and silence, can be very

powerful if properly utilized. Learning to use these tools, as well as to interpret and understand when others are using them, can provide a distinct advantage for the win-win negotiator.

## Time

Time is money and time is power. Time can also be one's enemy, depending on how it is utilized. The clock cannot be controlled, but the effects of the passage of time on negotiations can be put to one's advantage.

Deadlines often have a significant effect on negotiations. "In negotiating, eighty percent of the concessions will be made in the last twenty percent of the time available to negotiate" (Dawson, 1985, p. 103). Demands made early in negotiations are often difficult to settle because neither side is willing to make concessions. On the other hand, the impending deadline encourages one side, or even both sides, to make concessions. This tendency to not take action until necessary is demonstrated in other situations as well. When do most people file their income tax returns? Given a year to write his master's report, when does a student start work? The most

significant concessions and settlement actions can be expected to occur close to deadlines (Cohen, 1980; Dawson, 1985; Scott, 1981).

Knowing someone's deadline and they not knowing yours puts one at a great advantage. This is true even when your deadlines are the same. The pressure of deadlines is a very strong force. The North Vietnamese demonstrated this at the expense of the United States during the Paris-Vietnam Peace Talks in 1968 (Cohen, 1980; Dawson, 1985). The U.S. negotiator was placed under a great deal of time pressure by the President of the United States and did little to conceal this fact. Once in Paris he rented a hotel room on a week to week basis (Cohen, 1980; Dawson, 1985). When the North Vietnamese delegation arrived, they leased a comfortable villa for two-and-a-half years (Cohen, 1980; Dawson, 1985). They then proceeded to spend months discussing the shape of the negotiating table (Cohen, 1980; Dawson, 1985). The shape of the table probably made little or no difference to the Vietnamese, but they knew the U.S. negotiator's deadline and a wanted to put him under as much time pressure as possible. The tactics turned out to be extremely effective. Just two or three days before the United States' deadline,

there was a breakthrough in negotiations (Cohen, 1980; Dawson, 1985). Under tremendous time pressure the United States left the negotiating table having achieved little towards their goals (Cohen, 1980; Dawson, 1985).

In spite of their nonchalant attitude, the North Vietnamese also had a deadline (Cohen, 1980). Otherwise they would not have even been at the negotiations. The non-chalant attitude is effective. It works because one feels his own time constraints and believes them to be much greater than the opponent's. The tranquility displayed masks a great deal of stress and pressure. This is true in all negotiation encounters (Cohen, 1980; Dawson, 1985).

In most negotiations the best strategy is to not reveal one's true deadline unless necessary. Deadlines are the products of negotiation and are flexible. Never blindly follow a deadline. Carefully weigh the costs and benefits of meeting or exceeding deadlines.

The best results cannot be achieved quickly. Very often as the opponent's deadline approaches there will be a shift of power in one's direction. Concessions will be made, or a creative solution will

present itself. But these changes take time. People may not change, but with the passage of time, circumstances can (Cohen, 1980; Dawson, 1985).

*Acceptance time* is important in negotiations. This is the time required to get use to a new idea. A proposal other than that expected or hoped for is a new idea and requires time for acceptance. Do not rush an opponent into accepting a proposal because they may reject it immediately in defense. Explain the attractiveness, advantages, and fairness to both sides and then sit quietly. Going on to other issues for awhile or even adjourning for the day may be best. Gary Karass (1985), author of Negotiating To Close, wrote that his father taught him a valuable lesson about acceptance time. He quotes his father as saying:

> My ideas are my old friends and your ideas are your friends. You may have some very good friends. But you cannot expect me to throw away my friends and adopt your friends at a moment's notice, as soon as you introduce them to me. Give me time to get used to them and I may adopt them. But I need that time-I need that acceptance time. (Karrass, 1985, p. 115).

Give acceptance time to the other side. If that time is handled correctly, he may adopt your "friend."

Time has been compared to money. Both are invested, spent, saved, and wasted. Invest time in negotiations. Use deadlines to gain advantage. Do not rush time or opponents. In negotiating, time is money and power.

## Non-Verbal Communication

People communicate with and without words. Gestures and movements can provide more information than words themselves to the trained eye (Johnston, 1985). Gestures and movements are types of body language and are an important aspect of negotiating techniques. The ability to accurately read the feelings of others can be a powerful negotiating tool. Another form of non-verbal communication is silence. Silence can be a formidable weapon. Knowing when to use silence and how to interpret it is a powerful negotiating technique (Johnston, 1985; Karrass, 1985; Winkler, 1984).

### Body Language

"More than sixty percent of all communication is non-verbal" (Johnston, 1985; p. 10). People communicate both consciously and

subconsciously with body language during negotiations. The ability to *accurately* interpret body language can have a significant impact on the outcome of a negotiation. Body language provides clues, not concrete information. The situation in which body language is used must be analyzed as well as the gesture. Interpreting body language out of context can be harmful to one's negotiating position (Dawson, 1985; Johnston, 1985).

The term body language encompasses many means of communication. The following are some of the fundamental types of body language which apply to negotiations.

Negotiations usually begin and end with a handshake. It can tell much about an opponents attitude. Many personal traits can be discerned from a single handshake. A firm handshake indicates self-confidence, especially when accompanied with eye-to-eye contact (Johnston, 1985). A limp handshake may demonstrate apathy, or the lack of power and decision making abilities (Johnston, 1985). The person who turns his hand over, palm down, desires control and to dominate (Johnston, 1985). Sweaty palms indicate nervousness and anxiety (Johnston, 1985).

Smoking cigarettes is a sign of relaxation (Johnston, 1985). It can also indicate the start or finish of the meeting (Dawson, 1985).

A person rubbing the side of his nose while talking is probably lying or at least exaggerating (Dawson, 1985). However, a person just touching his nose, particularly if his eyes are closed, is probably concentrating very hard (Dawson, 1985). Rubbing or scratching the top of one's head shows embarrassment or discomfort (Dawson, 1985; Johnston, 1985). This is a good time to back off or change approaches (Dawson, 1985).

A person's hands reveal much (Dawson, 1985; Johnston, 1985). Drumming fingers indicate impatience (Dawson, 1985). Steepling is an indication of supreme confidence (Johnston, 1985). Steepling is the term for placing just the fingertips of each hand together with the heels of the hands separated (Johnston, 1985). When under strain, many people wring their hands (Dawson, 1985; Johnston, 1985).

The clues just mentioned are valid, but people are different and so is the meaning of their body language. For instance, some people smoke when they are nervous (Dawson, 1985). Some touch their noses and drum their fingers many times a day and the motions mean

nothing at all. Knowing the other persons natural habits and characteristics is a key to interpreting body language accurately. Body language alone should not be depended on during negotiations. It is only a small piece of the puzzle; to help in "reading" the other party. The technique of interpreting body language, tempered with common sense, can be very effective in reaching win-win solutions (Dawson, 1985; Johnston, 1985; NFCTC, 1985).

Silence

Silence is an extremely effective and simple negotiation tool. But the technique of using and reading silence correctly eludes most people. Silence can be a weapon or even a concession. The strength of this non-aggressive action should not be underestimated.

Most people dislike silence and will attempt to eliminate it by talking (Karrass, 1974b). This talking can provide valuable information to the patient, silent negotiator. Of course an experienced negotiator is not likely to provide a lot of information just to fill a void. But an inexperienced or nervous negotiator will often reveal far more than intended. The urge to fill silence with one more argument, an extra detail, or an extra attempt at persuasion, is

strong. This urge must be resisted, and should be used to obtain as much valuable information as possible from one's opponent (Karrass, 1974b).

When silent, listen. "Listening is the least expensive concession one can make. It can well be the most important" (Karrass, 1974b, p. 100). It is a concession of no tangible value, yet it is very valuable to one's opponent. A speaker is presenting himself for approval. He wants to be believed and understood. Listening intently gives one's opponent what he wants, and provides valuable negotiating information. Listening is a technique that provides benefits to both sides. The person who masters the technique of listening will largely increase his ability to profit.

Time and silence are effective negotiating tools. The time and effort spent learning the techniques and use of these tools will provide rewards to the negotiator.

# CHAPTER SIX
# NEGOTIATION DOCUMENTATION

## Introduction

Documentation is required for all negotiated contracts as stated in the FAR (FAR, 1986). The purpose of documentation is to justify the price established in negotiations is fair and reasonable, and to serve as a historical record (FAR, 1986; NFCTC, 1985). Included in the documentation are negotiation results and significant considerations which affected the final agreement (FAR, 1986; NFCTC, 1985). The summary of the documentation and results is called the Price negotiation memorandum (PNM) (NFCTC, 1985).

## Price Negotiation Memorandum

Reports of analysis and specific information which contributed to the determination that the final negotiated price was fair and reasonable must be included in the documentation file. The PNM and supporting file are used as justification for approval of the proposed negotiation, as well as a reference for future acquisitions. An accurate history of the acquisition is necessary due to rapid personnel turnover rates, numerous acquisitions, and the use of contract files in historical and investigational research (NFCTC,

1985). A reconstruction of the major considerations used in reaching a price agreement is required in the file. How the price was determined and why it is considered fair and reasonable must demonstrated clearly and conclusively in the file (FAR, 1986; NFCTC, 1985).

The *story* of the negotiation is told in the PNM. At a minimum it contains the following information; (a) the purpose of the negotiation, (b) a description of the acquisition, (c) the names and positions of government and contractor personnel, (d) the government's price objective and the basis for this amount, (e) a summary of the contractor's proposal, (f) summary of discussions and compelling arguments, (g) the significant facts and considerations used to establish the pre-negotiation price objective and the negotiated price, and (h) an explanation of any significant differences between the two positions (FAR, 1986; NFCTC, 1985).

There is often a large accumulation of data by the end of negotiations. Data from the contractor includes the price proposal, supporting schedules, and subcontractor cost or pricing data (NFCTC, 1985). Information generated from the government, such as the

independent government estimate and analysis of the contractor's data is included in the PNM (NFCTC, 1985). Also included is an explanation of how this data was used. Significant factual data is identified, how the facts influenced estimates of costs are explained, and what factors persuaded the negotiator to arrive at a particular figure are noted. The extent to which factual data was not used is also documented. Identified in the PNM are any cost or pricing data which were found to be inaccurate, incomplete or outdated (FAR, 1986; NFCTC, 1985; U. S. Naval School, 1986).

The extent of detail required in the PNM is determined primarily by the dollar amount (U. S. Naval School, 1986). Those negotiations which do not meet the standards which require a Contract Award and Review Board involve the least amount of detailed documentation. Unlike Board reports and Business Clearance Memorandums, the PNM for these small dollar amount negotiations remains in the field office file. A historical summary and evidence that the price established is fair and reasonable, but the effort should be in proportion to the size, importance, and political sensitivity of the acquisition (FAR, 1986; NFCTC, 1985; U. S. Naval School, 1986).

## Board Report

Negotiation and contractor selection are required by a Contract Award and Review Board for the following; (a) selection of architect/engineer firms if the fee is expected to be $2,500 or greater, (b) construction contract change orders with an estimated value of $50,000 or more, and (c) all other negotiations where the amount is expected to be $25,000 or greater (NAVFACENGCOM, 1985). When a Board is used to negotiate, the PNM is called a Board Report (NAVFACENGCOM, 1985).

## Business Clearance Memorandum

For contracts and change orders equal to or greater than $100,000, a Business Clearance Memorandum (BCM) is required (NAVFACENGCOM, 1985). The BCM is another form of the Price Negotiation Memorandum. It consists of two parts, a pre-negotiation clearance and a post-negotiation clearance (OICC Trident, 1985).

The pre-negotiation BCM is a request to negotiate. It is prepared after the contractor's proposal has been evaluated and any required audits have been performed. Addressed in it are the requirements that must be met in order to initiate negotiations, for

example (a) Equal Employment Opportunity clearance, (b) audit, (c) profit analysis, and/or (d) determination and findings report Also also outlined are significant details of the proposed negotiation such as; a field and technical analysis, cost and price analysis addressing all audit recommendations, and a negotiation strategy (NAVFACENGCOM, 1985). Approval authority is based on the expected dollar level of the negotiation. For example, the OICC level has approval up to $5,000,000, and NAVFACENGCOM has approval authority from $5,000,000 to $10,000,000. Negotiation above $10,000,000 requires Chief of Naval Operation approval (OICC Trident, 1985).

Part two, the post-negotiation clearance is prepared after the negotiation is complete. Evidence that the agreement reached was fair and reasonable is included, and serves as the historical record for the negotiated procurement. Also included in the post-negotiation BCM are the results of the negotiation, facts in addition to those in the pre-negotiation clearance which complement the price and cost analysis, and justification of any differences between the pre-negotiation BCM objective and the negotiated settlement (OICC Trident).

In either form shown above, the PNM contains the documentation demonstrating that the final agreement was fair and reasonable. By including all significant background data, actions, and the results of the negotiation, the PNM serves as as important historical document (NFCTC, 1985; NAVFACENGCOM, 1985).

# CHAPTER SEVEN
# SUMMARY

The purpose of this paper was to examine construction contract negotiation as it applies to the Navy CEC officer. The $2-3 billion each year in military construction performed by civilian contractors (NAVFACENGCOM, 1986) ensures the CEC officer of exposure to the negotiation environment. The growth in the number of military construction contracts (NAVFACENGCOM, 1986) further emphasizes the need for negotiation expertise in the CEC.

Topics examined include the circumstances which allow procurement through negotiation vice formal advertising, the three phases of the negotiation process, and recommended approaches to these phases.

Chapter two, Government Contract Negotiations, focused on the specific circumstances which allow negotiated procurement. The specific conditions are defined in United States Code, section 2304 (1986). In general, procurement through negotiation is allowed when formal advertising is not feasible. Formal advertising is not feasible if; (a) detailed plans and specifications are not available, (b) the work is classified, (c) a sufficient number of bidders is not available, or

(d) sufficient time is not available. The conditions which must exist in order to negotiate construction contracts are also defined in chapter two as well as the types of contracts which meet these conditions. Negotiations with the contractor are also performed after contract award. Bilateral change orders and contract terminations are the most common types of post-award negotiations.

The focus of chapter three, Preparation and Strategy, was the importance of preparation and how preparation applies to developing strategy. Preparation is the most important phase of the negotiating process due to the vast impact on all actions which follow. There were four factors given which should be considered when developing negotiation strategies. Location, climate, timing, and the negotiation agenda significantly effect negotiation results.

The negotiation team approach, as discussed in chapter three, has proven to be successful in developing and carrying out strategy. A team provides more information and expertise than one person possesses. However, in order to be effective, the team members must all work towards the same goals and be willing to put the team's goals before their own.

The Truth-in-Negotiations Act was also included in chapter three due to its value in price and cost analysis. The act requires, under certain conditions, that the contractor provide certification stating the cost and pricing data supporting the contractor's proposal is accurate, complete, and current. The purpose of this law is to provide safeguards for the government against inflated cost proposals.

Described in chapter four, Performing the Negotiation, was the process of opening a negotiation and the phases of negotiation performance. Opening the negotiation involves developing understanding, interest, and support of both teams. The government must concentrate on punctuality, personal appearance, and the formalities of introductions as well as establishing ground rules, power and authority, while creating a sense of objectivity and fairness. The opening process can determine whether a negotiation will be orderly and productive or confused and misguided. Performing the negotiation involves two major stages; (a) the exploratory phase, and (b) the agreement phase. The exploratory phase is an information gathering session with the contractor. Assumptions, issues and

objectives are evaluated for validity. Strategies are altered to reflect new information. The agreement phase involves moving towards an agreement which satisfies each party's needs. There are three ways to influence the other party to move; (a) domination, (b) compromise, and (c) concessions. Due to the concessions method being founded in reason, it is the preferred method for reaching agreement.

Described in chapter five, Mental Attitude and Approach, was the importance of a positive mental attitude in one's approach to negotiation, the effects of communication and ethics on the negotiation results, and the value of win-win negotiating. Effective communication is important to the process of reaching agreement. Communicating with a virtual stranger in a potentially hostile and suspicious environment is particularly difficult. Included in this chapter were the major areas of communication difficulties and methods of avoiding pitfalls. The highest standards of conduct are expected of all government personnel, and this should be reflected in the CEC officer's ethics. The philosophies of win-win negotiating

reflect high ethical standards that every officer and contractor is encouraged to adopt.

Described in chapter six, Tactics, were the short-run methods and procedures for reaching the long range goals of strategy. Tactics were divided into two areas, maneuvers and techniques. Maneuvers are moves or ploys for securing a position of advantage. Techniques are negotiating tools. Time, and forms of non-verbal communication such as silence and body language, can be powerful tools if properly utilized. Learning to use these maneuvers and tools, as well as to interpret and understand when others use them, can provide a distinct advantage for the win-win negotiator.

The focus of chapter seven, Negotiation Documentation, was the Price Negotiation Memorandum (PNM). The purpose of the PNM is to justify the price established in negotiations as fair and reasonable, and to serve as a historical record. Included in the document are negotiation results and significant considerations which affected the final agreement. Under certain conditions, the PNM takes the form of a Board Report. Under other conditions it is termed a Business Clearance Memorandum. Under other conditions, it takes the form of a

simple memorandum to the field office file. In all of these forms, the PNM contains the documents demonstrating the final agreement was fair and reasonable, and it serves as an important historical record.

The purpose of this paper was to examine the methods and procedures of negotiations, which when used, enable the CEC officer to perform effective negotiations. Provided is the material necessary to understand the circumstances under which negotiation is allowed, phases of negotiation, and approaches to negotiation. If developed and used properly, this knowledge will significantly enhance one's negotiation expertise.

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